IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1323 OF 2004

Waman Kushba Dhere & Anr. ...Appellants

Vs.

Ramchandra G. Pawar & Ors. ...Respondents

Mr. S.A.Sawant for the Appellants
Mr. S.M.Oak for the Respondent Nos.1 to 6.

CORAM: A.S.OKA, J.
DATED: MARCH 31,2005.

P.C.:

1. Admit on the following substantial questions of law :

i) Whether the Courts below committed an error by holding that the suit property was ancestral property though the suit property was standing in the name of original Defendant No.3-Sitaram and though Sitaram had source of income in the form of salary ?

ii) Whether the Appellate Court committed a serious error by holding that the sale deed dated 27th May 1991 in favour of the Appellants was bad in law for want of prior sanction of the Competent Authority under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947?
(hereinafter referred to as the said Act of 1947)

2. By consent taken up for final hearing forthwith.

3. The Respondent Nos.1 to 4 are the original Plaintiffs who filed a suit for declaration and injunction for challenging

the sale Deed executed by the original Defendant No.3 on 27th May 1991 in favour of the Appellants on the ground that the suit property was a joint family property in the hands of the Defendant No.3 Sitaram and there was no legal necessity for sale. The Appellants (original Defendant Nos.1 and 2) contended that the Defendant No.3 was the exclusive owner of the property. The Trial Court decreed the suit. The Appellate Court has confirmed the same.

4. The learned Advocate for the Appellants submitted that there was evidence on record to show that the original Defendant No.3 Sitaram was employed with Railways and he was having a regular income by way of salary. He submitted that as the suit property was all along standing in the name of original Defendant No.3, it was obvious that it was a self acquired property. He submitted that section 7 of the said Act of 1947 will not have any application as there was no evidence on record to show that any notice under Section 6 (2) was issued by the concerned authority under the said Act of 1947.

5. The learned Advocate for Respondents at the outset fairly stated that the bar under Section 7 of the said Act of 1947 will not be attracted as there is nothing on record to show that notice under Section 6(2) of the said Act of 1947 has been issued. He has invited my attention to the findings recorded by the Courts below on the factual aspects and

submitted that once existence of nucleus of the joint family was proved, it was for the Appellants to establish that the property was self acquired property of the Defendant No.3 and the Appellants have failed to discharge the said burden.

6. In view of the submissions made by the parties, the question of law based on bar of Section 7 of the said Act of 1947 stands decided. Even if bar of Section 7 is not applicable, the question which arises is whether the sale deed executed by Sitaram-Defendant No.3 was binding on other members of the joint family.

7. The Appellate Court has recorded a categorical finding that in the written statement filed by the Appellants itself it is admitted that that the family of the original Plaintiffs and the Defendant No.3 was a joint family and the said family was having nine agricultural lands and house properties which are ancestral properties. Therefore, the Appellate Court rightly came to the conclusion that existence of nucleus was established and though the property was in the name of Defendant No.3, it was for the Appellants to establish that the same was purchased out of his own income by the original Defendant No.3.

8. The Courts below have considered the oral and documentary evidence on record. The Courts below have noted that acquisition in the name of the Defendant No.3 in the year

1955 was made for the price of Rs.300/-. Reliance was placed by the Appellants on the admission given by the P.W.No.1 in his cross examination. The Appellate Court has observed that admission is very vague and it is not to the effect that at the time of acquisition of the property, the Defendant No.3 was serving in the Railway Department. Considering the evidence on record, the Appellate Court has recorded a finding that there is nothing on record to show that in the year 1945 deceased Defendant No.3 was serving in the Railway Department. There is also a finding of fact recorded by the Appellate Court that even assuming that Defendant No.3 was employed in Railway Department, there is no evidence about the salary he was receiving in the year 1945. Considering the oral and documentary evidence on record, the findings of fact has been recorded that though the acquisition was in the name of Defendant No.3, it was an acquisition by Defendant No.3 in his capacity as 'Karta' of joint Hindu family which was admittedly in existence. The Appellants failed to establish that the sale by the Defendant No.3 was for legal necessity. It is therefore, obvious that the sale deed executed by the Defendant No.3 is not binding on the co-sharers.

9. The Trial Court has passed the following decree :

1. The suit is decreed with costs as under :

2. It is hereby declared that the sale deed dated 27.5.1991 (Exh.84) executed in favour of the defendant Nos.1 and 2 by the deceased defendant No.3 is null and void and it is not binding on the Plaintiffs and Defendant Nos.3A and 3B.

3. The defendant Nos.1 and 2 are hereby perpetually restrained from interfering and obstructing the peaceful possession of the plaintiffs over the suit land described in para 1 of the plaint..."

10. The learned Counsel for the Appellants made a grievance that as a result of the decree the Appellants will be totally ousted. It is to be noted that the Appellants are the strangers to the joint family and they have purchased an undivided share of deceased Sitaram and therefore as a purchasers they will have to file a suit for general partition.

11. The learned Counsel for the Appellant states that decree passed by the Trial Court was stayed during the pendency of the Appeal and this Court has granted interim relief which is operating till today. This Court has granted limited interim relief restraining the Respondents from creating third party interests and from changing the nature of the property. 12.

In view of the discussion made above, though the finding by the Appellate Court on one of the issues is incorrect, ultimate decree passed by the Appellate Court will have to be confirmed. It is clarified that it will be open for the Appellants to file a suit for general partition for obtaining possession of the separate share of the deceased Defendant No.3 which they have purchased. To enable them to do so and to apply for appropriate interim relief in a suit for partition, ad-interim relief granted by this Court deserves to be continued for a reasonable time.

13. Hence I pass the following order :

i) Second Appeal is dismissed with no order as to costs. The dismissal of the Appeal will not prevent the Appellants from filing a suit for general partition and separate possession of undivided share of deceased Defendant No.3 purchased by them under the sale deed dated 27th May 1991.

ii) To enable the Appellants to file a suit for general partition and to apply for appropriate interim relief in the said suit, ad-interim relief granted by this Court on 3rd December 2004 will continue to operate for a period of six months from today.

. Parties to act upon an authenticated copy of this order.

Judge.